FOR ARGUMENT

Supreme Court, U.S.
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No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,
Petitioners

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for Fifth Circuit.

BRIEF *AMICI CURIAE* OF DEMOCRATS FOR LIFE and THE NATIONAL LEGAL FOUNDATION,

in support of the *Respondents and supporting affirmance.*

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INTEREST OF *AMICI CURIAE*[1]

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life, at all stages from conception to natural death, is the foundation of human rights, authentic freedom, and good government. DFLA has consistently supported both the protection of unborn life and the support of women and children's health. For example, DFLA supported the Affordable Care Act, including the Pregnancy Assistance Fund (PAF), which provides expectant and patenting mothers with a network of support to help them gain access to health care, child care, family housing, and other critical services. The PAF was based on the DFLA-drafted Pregnant Women Support Act.

The National Legal Foundation (NLF) is a public interest law firm established in 1985 that regularly litigates and files *amicus* briefs in the federal courts, including in this Court. The NLF has an interest on behalf of its donors and supporters, including those in Texas, in seeking to protect women's health in the politically charged context of

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[1] All Petitioners and Respondents have consented to the filing of this Brief. The letters of consent accompany this Brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

abortion. Like DFLA, the NLF holds a pro-life position. However, also like DFLA, the NLF believes that the health of women is critically important. Nonetheless, the NLF has often been painted with the same brush used to paint the Respondents in this case, namely that we somehow seek to harm or punish women. The NLF, its donors, and its supports seek to demonstrate that that this is patently incorrect.

SUMMARY OF THE ARGUMENT

The Respondents (collectively "Texas") assert that Texas House Bill 2 ("HB2") was enacted to protect the women of Texas in response to the so-called "Kermit Gosnell scandal" in Pennsylvania, and that Texas—like other states—enacted measures to protect the health of women seeking abortions. On the other hand, the Petitioners (collectively "Whole Woman's Health") claim that HB2 was enacted for the impermissible purpose of placing obstacles in the way of women seeking to obtain abortions. And many of Whole Woman's Health *Amici* claim Texas actually wanted to harm and punish women.

This Brief offers this Court an analogy that it has been offered before, in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), to demonstrate that the legislature's intent in enacting HB2 was, indeed, to protect the health of women and was not a pretext for harming or punishing women.

ARGUMENT

I. THE CONFLICTING VIEWS OF THE PARTIES REGARDING THE LEGISLATURE'S INTENT.

Texas asserts that HB2 was enacted to protect the women of Texas in response to the "Kermit Gosnell scandal." Resp.'s Br. 1. Further, Texas notes that HB2 in part tracks the recommendation of the grand jury that indicted Gosnell and in part tracks an earlier recommendation of the National Abortion Federation. *Id.* at 1-2. Texas was one of a number of states to react to the Gosnell scandal. *Id.*

Texas has explained to this Court that its legislature heard testimony regarding the health benefits of HB2, including the following benefits: medical records access, dealing with complications, continuity of care, quality of care via peer review, and physical-plant-related patient safety. *Id.* at 34-35 & nn.13-14; 39-40 & nn. 15-16.

Nonetheless, Whole Woman's Health claims that HB2 was enacted for an impermissible purpose:

> The true purpose of the Texas requirements—the only purpose those requirements actually serve—is to create obstacles to abortion access for the sake of hindering women who seek the procedure.

Petr. Br. 36.

Further, Whole Woman's Health asserts that Texas is disingenuous in claiming that it is seeking to protect women:

> [A] court should not blindly accept the rationale a state offers for an abortion restriction, and for good reason. A state could easily disguise impermissible efforts to hinder abortion as permissible efforts to promote women's health. Only by assessing whether a restriction is reasonably designed to serve its stated purpose can a court ensure that the State's rationale does not disguise an effort "to make abortions more difficult."

Id. at 37 (citation omitted).

Significantly, however, Whole Woman's Health does "not cite anything from HB2's legislative history to corroborate their claim that the legislature's stated objectives were pretextual. Neither did the district court." Resp.'s Br. 32.

II. A USEFUL ANALOGY TO DISCERN THE LEGISLATURE'S INTENT.

Your *Amici* believe that an analogy that has been presented to this Court before will help demonstrate that seeking to promote women's health in the abortion context is not tantamount to purposing to create obstacles. The analogy will also support Texas' fuller explanation of this point:

> In all events, this Court "do[es] not assume unconstitutional legislative intent even when statutes produce harmful results." An "awareness of consequences" is not sufficient to demonstrate an unconstitutional purpose. In any industry, businesses that do not meet governing regulations may not be able to operate, and a legislature may be well aware of that fact. But that does not prove a legislative purpose to produce whatever effects may flow from closing a business, rather than to achieve the public-welfare benefits of the regulations.

Resp.'s. Br. 42. (citations to this Court's opinions omitted).

The analogy was presented to this Court during its consideration of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). At issue in *Bray* was, among other things, whether abortion protestors were motivated by animus towards women. The analogy showed that the protestors were opposed to abortion, not women. Here, *mutatis mutandis*, the analogy shows that Texas favors women's health, not seeks to harm or punish women.

At the oral re-argument of *Bray*, the Deputy Solicitor General made the following point on behalf of the United States as *amicus* in support of the protestors:

> Respondents [argue] that only women can exercise the right to an abortion, and therefore

> petitioners' antiabortion activities have a discriminatory impact on women. People intend the natural consequences of their acts, and therefore respondents argue, you can infer from the discriminatory impact that petitioners have a discriminatory purpose.
>
> A few examples will show that the logic of that doesn't hold up. Consider, for example, an Indian tribe with exclusive fishing rights in a particular river. A group of ecologists get together who are opposed to fishing in the river, because they think it disturbs the ecology. They interfere with the Indians' rights.
>
> The impact of their conspiracy is on a particular Indian group, but it would be quite illogical to infer from that they have any animus against Indians. They're opposed to fishing in the river, not Indians, even though only Indians can fish in the river. Petitioners are opposed to abortion, not women, even though only women can exercise the right to an abortion.

Bray v. Alexandria Women's Health Clinic, 1992 WL 687912 (U.S.), 12-13 (U.S. Oral. Arg. 1992).

This analogy resonated with at least one Justice as the following exchange with counsel for the clinic demonstrates:

> QUESTION: . . .
> What do you do with the hypothetical that Mr. Roberts gave us of an Indian tribe that has

> only — has exclusive fishing rights and ecologists seek to stop the fishing? That fits exactly the description you've just given us. This is the only class that has the rights, and you're seeking to prevent those rights from being exercised. How — are you saying that, indeed, in Mr. Roberts' example, that would be a violation of this statute?
>
> MS. ELLIS: I think that would show class-based animus —
>
> QUESTION: It would. [probably read "It would?"]
>
> MS. ELLIS: If — yes, Your Honor, although I don't think that a ruling in this case would need to reach that precise conclusion, because in this case we're only asking the Court to recognize that class-based animus is present when a constitutional right is taken away. So —
>
> QUESTION: But it seems to me you're fighting the hypothetical. The hypothetical is, ecologists want to protect fish. They don't care who's fishing.
>
> MS. ELLIS: Uh-huh.

Id. at 22-23.

However much this analogy contributed to this Court's decision in *Bray*, it certainly squares with *Bray's* outcome: "the claim that petitioners'

opposition to abortion reflects an animus against women in general must be rejected," 506 U.S. at 269.

And it also certainly provides insight in the instant case. Your *Amici* believe that implicit in Whole Woman's Health's Brief is the idea that Texas' motivation is to harm or punish women, not to promote their health. Regardless of the accuracy of your *Amici's* belief regarding Whole Woman's Health's Brief, many of Whole Woman's Health's *Amici* make this point explicitly.

Amici Jane's Due Process, Inc.; Law Professors Melissa Murray, *et al.*; Historians; and National Advocates for Pregnant Women, *et al.*, all claim that Texas is out to attack the dignity of women. Br. *Amicus Curiae* Jane's Due Process 7, 17, 25-26, 35-36; Br. *Amici Curiae* Law Professors Melissa Murray, *et al.* 2-10, 13-22; Br. *Amici Curiae* Historians 1, 9-10, 22-23; Br. *Amici Curiae* National Advocates for Pregnant Women, *et al.* 1, 4, 8, 15-16.

The National Abortion Federation, *et al.*, claim that "all of these stories [contained in its Brief] highlight the cruel emotional, financial, and psychological harms that the Texas legislature has visited on women who struggle to obtain timely care ." Br. *Amici Curiae* National Abortion Federation, *et al.* 30. The entirety of the Brief makes it plain that the National Abortion Federation believes the legislature *intended* these results. The Brief of National Center for Lesbian Rights, *et al.*, accuses Texas of deliberately using "pseudo-science" to trample women's rights. *See generally*, Br. *Amici*

Curiae National Center for Lesbian Rights, *et al.* The Brief of National Advocates for Pregnant Women, *et al.*—despite acknowledging statements of "a host" of "antiabortion leaders" that abortion laws should focus on "on protection, not punishment"—insists that the legislature's intent was to "punish" women. Br. *Amici Curiae* National Advocates for Pregnant Women, *et al.* 21 &n.60; 2, 4-6, 13-15, 21-25. Similarly the Brief of Theologians and Ethicists accuses Texas of seeking to "punish, stigmatize, and demean women." Br. *Amici Curiae* Theologians and Ethicists 12.

Perhaps the Brief of Law Professors Melissa Murray, *et al.* most explicitly implicates the *Bray* analogy:

> The challenged requirements are uniquely and exclusively applicable to women because of the procedure they seek to regulate. Texas's laws do not even contemplate requirements that make such long distance travel necessary for comparable medical procedures, or medical procedures that pertain only to men. While individuals may elect to travel in order to seek medical care from certain providers, or to access procedures that are untested, complex, or infrequently performed, those burdens fall equally on both sexes, and do not target a procedure that only women will have reason to seek

Br. *Amici Curiae* Law Professors Melissa Murray, *et al.* 15.

The *Bray* analogy by itself lends considerable support to the idea that the legislature's desire to protect women's health is both real—that is, non-pretextual—and not tantamount to a desire to harm or punish women. Combined with the testimony that the legislature actually heard regarding health benefits, and with the absence of any explicit claim of pretext by Whole Woman's Health or the district court, this Court should reject Whole Woman's Health's innuendo and its *Amici's* explicit claims to the contrary.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,
this 2nd day of February, 2016,

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